



Mental Health Matters 2

Community Action & Advocacy Group

Perth, Western Australia

Introduction:

Mental Health Matters 2 (MHM2) is a community action and advocacy group which was convened in February 2010 in Perth, Western Australia (WA). It was convened in response to concerns by a number of family and community members about the experiences of their loved ones with diagnoses of serious mental illness who were 'falling through the gaps' and into the criminal justice system. These families saw the need for systemic advocacy and action to address these often tragic situations.

The current membership of 1000+ supporters and members is an alliance of people with a personal experience of mental distress and/or drug and alcohol use, some of whom are involved in the criminal justice system; families and friends of individuals with these experiences as well as practitioners who provide services to people with mental ill-health across a range of public, private and community-managed organisations. Mental Health Matters 2 is guided by a Steering Group of seven volunteers whose backgrounds reflect the composition of the broader membership. The work of MHM2 is founded on 5 core values and it strives to advocate in ways that are Gracious, Informed, Just, Resolute and Hopeful.

The group particularly advocates for those individuals and families experiencing multiple unmet needs. These unmet needs include, but are not limited to, ongoing mental distress, alcohol and other drug use, compromised physical health and involvement in the criminal justice system. A number of the supporters have had direct and indirect involvement with the Criminal Law (Mentally Impaired Accused) Act 1996 which allows for indefinite detention in particular circumstances. Further detail is given later in this document.

MHM2 does not receive any private or public funding to run its core operations and appreciates the support and expertise of dedicated volunteers to undertake activities such as the preparation of submissions.

MHM2 was a key advocate for the creation of a diversion program for people with mental distress in the Western Australian court system between 2010 and 2013. The pilot START court has now been in operation in Perth Magistrates Court since 2013 as well as the pilot Links program in Perth Children's Court. Both of these initiatives have a therapeutic jurisprudence approach and seek to divert young people and adults experiencing mental distress who have come into the criminal justice system, to treatment and support.

MHM2 was the proud recipient of the 2015 Equal Opportunity Commission Award for human rights, equity and diversity in mental health in WA.

MHM2 appreciates the opportunity to submit this brief submission to the Senate Inquiry on 'The indefinite detention of people with cognitive and psychiatric impairment in Australia'.

MHM2 also supports the comprehensive submission made by the Western Australia Association for Mental Health. Where there is a discrepancy between that submission and this one, this submission prevails.

Background:

This submission will focus on the WA Criminal Law (Mentally Impaired Accused) Act 1996 (the Act) and the impact of, or the possibility of, indefinite detention for people with mental illness who are assessed as being Unfit to Stand Trial or Not Guilty due to Unsound Mind.

Under the Act, innocent people with 'mental impairment' – who have not been convicted of a crime – can be detained indefinitely by way of a Custody Order. Long-term advocacy by a number of organisations and individuals in WA since at least 2003 (the Holman review), has so far failed to gain any real traction in amending or abolishing this legislation. A review process has been in place, through the WA Department of the Attorney General for some significant time now, the lack of urgency around which could indicate a lack of political will or priority to deal with this unjust Act.

This legislation is incongruent with the reform agenda in mental health in WA at this time. It also sits in direct opposition to a recovery focus in mental health, which is promoted in WA, nationally and internationally.

The National Standards for Mental Health Services include a Recovery standard which 'highlights the requirement to incorporate recovery principles into service delivery, culture and practice to better reflect contemporary mental health practices'. (Department of Health and Ageing. National Standards for Mental Health Services Information Sheet. 2010).

There are many definitions of recovery and we have selected the definition used in the Blueprint for Mental Health Services in New Zealand (1998) which defines recovery as 'living well in the presence or absence of one's mental illness'. This definition is distinct from, but may, include clinical recovery, functional recovery or recovery arising from psychiatric rehabilitation. Recovery is underpinned by the values of citizenship, hope, connection and empowerment. These values must also underpin any approach to working with people with cognitive impairment and intellectual disability.

In 2008, Australia became a signatory to the United Nations Convention on the Rights of Persons with Disabilities and any Australian state or territory mental health legislation should meet the standards presented in that document.

The Impact of the presence of Indefinite Detention

Mental Health Matters 2, in partnership with Cyrenian House drug and alcohol agency run an award-winning¹, bi-monthly family education and support group called Families 4 Families WA. It is at this forum that distressed and concerned family members and supporters of people experiencing mental ill-health often recount their traumatic experiences of falling between systemic service gaps in the mental health and alcohol and other drug sectors and ending up in the criminal justice system, including remand in prison.

A core theme which runs through many of the recounted experiences is that families and supporters, often as well as the person experiencing mental distress, were seeking help from mental health services with increasing urgency in the days and weeks before the (alleged) incident/s occurred. Their failure to receive the necessary and timely responsive support contributed significantly to the events which resulted in their involvement in the criminal justice system.

It is often the stated desire of these family members that their experiences are learned from in order that safety for the person, themselves and the wider community can be improved. We believe that this is in line with an object of the Act – community safety.

It is then within the contexts of community safety, reform, recovery and human rights that the following comments are made.

It is our submission that the CLMIA Act and the possibility it poses for indefinite detention needs to be radically re-worked in order to better reflect the more progressive human rights and recovery focus of international, national and state policy and practice in mental health.

As it stands, it is our opinion that the Act is a heinous piece of legislation which significantly impacts on people with mental ill-health who intersect with the criminal justice system and their families and carers who, it must be remembered, are also part of the community of Western Australia.

In the interests of pragmatism we submit that there are some fundamental, urgent amendments which must be made to the current legislation in the meantime which would seek to at least halt further injustices being carried out under this Act.

A significant impact of the presence of indefinite detention under the Act is that we hear, through our network, of individuals who elect to plead guilty, sometimes to serious offences, in order to avoid the possibility of being locked up in prison indefinitely should a defence of 'Not guilty due to Unsound Mind' be successful.

Their criminal record then becomes a further stigma and obstacle to overcome when accessing services, trying to gain volunteer work or employment or undertake overseas travel, which is sometimes to stay connected with family or country of

¹ 2014 Alcohol and other Drug Excellence Award (Families Category)

origin. There is no way to accurately assess this impact however, it is a regular topic of discussion at our fortnightly meetings.

Families and supporters whose friend or family members with mental ill-health has gone on remand to prison (adult) have commonly reported incidences where medication has not been provided to the individual, assessments regarding mental health have not been effectively conducted and efforts made by families to ensure that a person receives the mental health care they need have been unsuccessful. This then results in the person becoming more unwell and less likely to recover fitness to stand trial, as a result of the inappropriate and often frightening prison environment and lack of appropriate treatment and mental health care.

Recommendations:

MHM2 supports the following recommendations to the Act to help minimise the opportunity for and impact of indefinite detention.

1. Allow judiciary the discretion to impose a range of options for mentally impaired accused through introducing a community-based order for mentally impaired accused found unfit to stand trial, and repealing Schedule 1 to make Custody Orders no longer compulsory for some offences.
2. Limit terms – Custody Orders should be no longer than the term the person would likely have received, had they been found guilty of the offence.
3. Introduce new procedural fairness provisions, which provide for rights to appear, appeal, review and rights to information and written reasons for a decision in court and Mentally Impaired Accused Review Board (MIARB) proceedings.
4. Introduce a special hearing to test the evidence against an accused found unfit to stand trial.
5. Ensure determinations about the release of mentally impaired accused from custody, and the conditions to be attached to such release (if any) are made by the MIARB with a right of review before the Supreme Court on an annual basis.

A determination of a person's Unfitness to Stand Trial should only be made by a mental health specialist and required for any charges which are likely to be continued (ie where it has been established that there is sufficient grounds on which to proceed with a charge).

A person whose fitness is being assessed should be supported to stay in the least restrictive environment during the time of assessment, particularly given that psychiatric reports can currently take approximately three months to be available to the courts in WA.

Professor Bryant Stokes in the 2012 Stokes Review² reported that His Honour Judge Dennis Reynolds of Perth Children's Court and the Commissioner for Children and Young People had both raised concerns about the inadequate situation for young people in remand and detention.

The Commissioner of Children and Young People offered three recommendations in relation to children and judicial system to the Stokes Review. They were:

1. Priority is given by the mental health service to the assessment, referral, admission and continuity of treatment of children and young people in the out-of-home care or leaving care.
2. A dedicated forensic mental health unit for children and young people be established.
3. Children and young people appearing before the Children's Court of WA have access to appropriate, comprehensive mental health assessment, referral and treatment services.

A judicial officer must be confident that there is sufficient grounds on which a charge should be continued in the first instance. If this is deemed to be the case, then the evidence should be tested in a special hearing. However, given that it is a fundamental right of a person to defend themselves against a charge, every support must be afforded to the mentally impaired accused person to input to the process, as far as is practicably possible, as they may, for example, have an alibi or evidence which would refute the charge.

The level of trauma and anguish experienced by individuals and families who face the possibility and experience of indefinite detention, cannot be minimised or continue to be overlooked within a humane society.

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² Government of Western Australia. *Review of the admission or referral to and the discharge and transfer practices of public mental health facilities/services in Western Australia.* Professor Bryant Stokes, AM July 2012 pgs 114-122.